

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: October 8, 2010

TO: Mary P. Wright, Deputy Director, City Planning & Community Investment

FROM: City Attorney

SUBJECT: Applicability of Conflict of Interest Laws to Community Planning Groups and Analysis of Possible Conflicts of Interest of San Diego State University Employees on the College Area Community Council

INTRODUCTION

The Office of the City Attorney has been asked several times over the years whether conflict of interest laws apply to the Community Planning Groups (CPG). The opinion has consistently been that conflict of interest laws do not apply to these groups.¹ In light of this office's revised opinion on the applicability of the Brown Act to the Community Planning Groups,² you have asked our office to revisit the issue of the conflict of interest laws. In particular, you have asked about the legality of employees of San Diego State University (SDSU) serving on the College Area Community Council (CACC), the College Area CPG.

QUESTIONS PRESENTED

1. Are Community Planning Groups subject to state or local conflict of interest laws?
2. Do CACC members employed by SDSU have prohibited conflict of interest?

¹ Previously issued publicly available opinions are a memorandum dated March 3, 2003; 1992 MOL 366 (92-49; May 27, 1992) and a memorandum dated May 11, 1983.

² City Att'y MOL No. 2006-26 (October 27, 2006).

SHORT ANSWERS

1. No. The state and local conflict of interest laws do not apply to Community Planning Groups.
2. No. There is no general prohibition against the SDSU members serving on the CACC. Any analysis of specific conflicts of interest will depend on the facts presented.

BACKGROUND

The City of San Diego formally recognizes CPG through Council Policy 600-24 for the purpose of making “recommendations to the City Council, Planning Commission, City staff, and other governmental agencies on land use matters, specifically, concerning the preparation of, adoption of, implementation of, or amendment to, the General Plan or a land use plan when a plan relates to each recognized community planning group’s planning area boundaries.” Council Policy 600-24, Background, at 1 (2007). The CPGs also advise on other land use matters as requested by the City or other governmental agencies. *Id.* The Council Policy sets forth some parameters by which the groups must operate to receive official City recognition and indemnification, including compliance with the Administrative Guidelines developed by City staff, which are “intended to explain this Policy’s minimum standard operating procedures and responsibilities of planning groups.” Council Policy 600-24, Policy, at 2 (2007).

Regarding conflict of interest, the Council Policy states only the following:

Any member of a recognized community planning group with a direct economic interest in any project that comes before the planning group or its subcommittees must disclose to the planning group that economic interest, and must recuse himself or herself from voting and must not participate in any manner as a member of the planning group for that item on the agenda.

Council Policy 600-24, Article VI, Sec. 2(c)(i), Community Planning Group and Planning Group Member Duties, at 15 (2007).

The College Area Community Council Bylaws (CACC Bylaws) state that two of the 20 members shall be appointed, one by the President of SDSU, and one by the President of the Associated Students of SDSU. Currently, there are four members of the CACC that are affiliated with SDSU; two members are appointed by SDSU representatives in accordance with the bylaws, one member was elected, and the records are not clear how the other member was selected.

ANALYSIS

The Brown Act and Conflict of Interest laws do not apply to the exact same officials and bodies. The Ralph M. Brown Act (Cal. Gov’t Code sections 54950-54963) applies to legislative bodies. “Legislative bodies” are defined in the Brown Act as “[a] commission, committee, board, or

other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body.” Cal. Gov’t Code § 54952(b). As set forth in this Office’s 2006 Memorandum of Law, the CPGs are legislative bodies because of their formal recognition by Council Policy and the fact that they exist for the purpose of advising the City.

To determine whether an official or body is subject to “conflict of interest” laws, several different statutory schemes must be considered. For City of San Diego officials or bodies, these are the State of California Political Reform Act, California Government Code 1090-1099, and the San Diego Municipal Code. In addition, the CPGs must comply with Council Policy 600-24 and the duty to recuse in the event of a direct economic interest.

I. STATE AND LOCAL CONFLICT OF INTEREST LAWS DO NOT APPLY TO THE COMMUNITY PLANNING GROUPS.

A. Political Reform Act. The Political Reform Act (the Act), California Government Code sections 81000-91015, applies to “public officials,” defined as every member, officer, employee or consultant of a state or local government agency. Cal. Gov’t Code § 82048. The Act was adopted to ensure that public officials perform their duties in an impartial manner, free from bias caused by their financial interests. Cal. Gov’t Code § 81001. For the purposes of a volunteer committee, the following definition applies:

“Members” includes unsalaried members of committees, boards or commissions with decision-making authority; meaning the body has the authority to make a final governmental decision, to compel or prevent the making of a governmental decision through use of an exclusive power to initiate or veto that may not be overridden, or it makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency. *See* Cal. Code Regs. title 2, § 18701(a).

The CPGs make recommendations to the City and other governmental agencies, and do not make nor compel final governmental decisions. Furthermore, while comments and recommendations by the CPG are usually taken into consideration by the final decisionmaker or even by an applicant prior to a project reaching the decisionmaker, there is no history that CPG recommendations have been “regularly approved without significant amendment or modification by another public official or governmental agency” over an extended period of time. Therefore, members of CPGs are not public officials under the Political Reform Act.

B. Government Code section 1090. California Government Code sections 1090-1099 prohibit a governmental officer or employer from making or participating in the making of a contract in which he or she has a financial interest. The California Attorney General has opined that the prohibitions of 1090 apply to the members of advisory bodies that participate in the making of a contract in their advisory capacity. 82 Ops.Cal.Atty.Gen. 126 (1999). The concept of making a contract extends to preliminary discussions, negotiations, compromises, reasoning and planning. *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222

(1968). While “contracts” are not statutorily defined for the purposes of 1090, the California Attorney General recommends reference to general contract law principles. 84 Op. Cal. Att’y Gen. 34 (2001). A contract, as defined by the California Civil Code, is “an agreement to do or not to do a certain thing”. Cal. Civ. Code § 1549. At a minimum, there must exist: 1) parties capable of contracting, 2) their consent, 3) a lawful object, and 4) a sufficient cause or consideration. Cal. Civ. Code § 1550. The CPGs are not authorized to contractually bind the City, and in the course of making land use recommendations do not participate in the making of contracts.

C. City’s Ethics Ordinance. The City’s Ethics Ordinance is set forth in San Diego Municipal Code Chapter 2, Article 7, Division 35. The purpose of the ordinance is, in part, “to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest and the appearance of conflicts of interest . . .” San Diego Municipal Code § 27.3501. The ordinance defines City Officials to include “any *City Board* member . . .” SDMC § 27.3503(b). A City Board is then defined to include any board, commission, committee, or task force whose members are required to file statements of economic interest. *Id.* The CPG members are not required to file statements of economic interest, therefore, the City’s Ethics Ordinance does not apply to them.

II. ANALYSIS OF CONFLICT OF INTEREST OF CACC MEMBERS.

In the absence of specific facts to analyze for a potential conflict of interest, the following discussion is meant to provide general guidance on the question of whether, as a matter of law, SDSU members are prohibited from being CACC members. The CACC bylaws require two appointees from SDSU; one appointed by the President of SDSU and one appointed by the President of the Associated Students of SDSU. CACC Bylaws, Art. III, Sec. 2. In addition, there are currently two other members who are employed by SDSU.

As stated above, the CPGs are not subject to state and local conflict of interest laws. They do, however, have to comply with Council Policy 600-24. Council Policy 600-24 requires a CPG member with a “direct economic interest” to recuse him or herself from voting on the project for which they have the interest, and to refrain from participating in any manner as a planning group member for that item. Council Policy 600-24. The standardized bylaws shell included as part of the policy also contains this requirement.

The Council Policy 600-24 Administrative Guidelines provide more guidance on evaluating possible direct economic interests; setting forth the following examples:

- An owner, or part owner, of all or part of the subject property, business or development.
- The project architect, engineer, sales agent, or other team member.
- An employee, in any capacity, of a company, or subcontractor, or representative which is part of the subject team.

- A former member of the project team that has received significant compensation for project team work within the past twelve months.

Administrative Guidelines, Article VI, Sec. 2(c), at 24.

In addition, the Administrative Guidelines establish that state law may be drawn upon for guidance in determining whether there is a direct economic interest. Pursuant to California Code of Regulations, Title 2, section 18704, direct economic interests pursuant to the Act are determined based on the type of economic interest, as follows:

1. When a person (including business entities or sources of income or gifts) initiates a proceeding, or is a named party or is the subject of the proceeding before the public official's agency. Ca. Code Regs. title 2, § 18704.1.

There are no facts presented to indicate that this type of direct economic interest exists due to SDSU employees' membership on the CACC.

2. When the public official has an interest in real property located within 500 feet of the property that is the subject of the governmental decision, or has an interest in the property that is the subject of a governmental decision regarding land use entitlements, zoning,³ annexation, sale, leasing, subdivision, taxes or fees, redevelopment actions, or construction or improvements to streets, water, sewer, storm drains, or similar facilities, and the public official will receive new or improved services.⁴ Cal. Code Regs. title 2, § 18704.2. An interest in real property is defined as any "leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly or indirectly by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2000) or more." Cal. Gov't Code § 82033. In addition, an interest in real property includes a pro rata share of interest in real property of any business entity or trust in which the individual or immediate family owns, directly, or indirectly or beneficially, a 10% interest or greater. *Id.* The jurisdiction of the public official is the area over which the agency has jurisdiction, and any property within the boundaries or within two miles of the boundaries of the agency or within two miles of any land owned or used by the agency. Cal. Gov't Code § 82035.

There are no facts presented to indicate that this type of direct economic interest exists due to SDSU employees' membership on the CACC.

3. When the governmental decision has any financial effect on his or her personal finances, or those of his or her immediate family. Cal. Code Regs. title 2, § 18704.5. A governmental decision will have an effect on this type of economic interest if the decision will result in an increase or decrease to the personal expenses, income, assets, or liabilities of the

³ If the changes to development standards and zones are applicable to other properties within the same category, the interest is considered to be indirectly involved. Ca. Code Regs. tit. 2, § 18704.2(b)(1).

⁴ Maintenance to existing facilities is excluded. Ca. Code Regs. tit. 2, § 18704.2(b)(2).

official, or his or her immediate family. Cal. Code Regs. title 2, § 18703.5. Income is defined broadly, and includes salary, dividends, rent, proceeds from sales, gifts, loans or forgiveness of loans, and the community property interest in the income of a spouse. Cal. Gov't Code 82030(a). There are various exclusions from the definition of salary; a particularly relevant exclusion is income from a government agency. Ca. Gov't Code 82030(b)(2). State of California universities are government agencies for the purposes of this exemption. *Jorgensen* Advice Letter No. A-94-128 (California Fair Political Practices Commission).

There are no facts presented to indicate that this type of economic interest exists due to SDSU employees' membership on the CACC.

Furthermore, as to the appointed seats, the Act specifically recognizes that in some situations, members may be appointed for the very purpose of representing the interest that would otherwise be a prohibited conflict of interest. Cal. Code Reg. title 2, § 18707.4. This exception applies when 1) either the statute, ordinance, or other provision of law which created or authorized the board contains a finding and declaration that the persons appointed are to represent and further the specific economic interest, or such requirement is implicit from other circumstances, 2) the member is required to have that specific economic interest, 3) the board decision does not have a reasonably foreseeable materially financial effect on any other economic interest held by the member and 4) the decision of the board must have substantially the same or proportionately the same financial affect on the member's economic interest as the decision will have on fifty percent of those who the member was appointed to represent. *Id.*

Council Policy 600-24 states that CPGs may "deem it appropriate to designate appointed seats to better represent specific interests of the community." Council Policy 600-24, Article III, Sec. 3, at 6. The "[a]ppointed seats are filled by the appointing agency or organization." *Id.* The CACC bylaws require two appointees from SDSU; one appointed by the President of SDSU and one appointed by the President of the Associated Students of SDSU. CACC Bylaws, Art. III, Sec. 2. The requirement of these CACC members to represent SDSU may be implicit in the requirement that the appointment be made by the SDSU authorities.

The Fair Political Practices Commission (FPPC), the entity charged with implementing the Act, pursuant to California Government Code section 83111, has interpreted statutory language requiring appointees to "be a representative" of certain industries to signify that the appointees were appointed to represent and further those specific economic interests, and therefore their interests fell within the exemption set forth in title 2, section 18707.4 of the California Code of Regulations. *Dorsey* Advice Letter, I-01-102. On the other hand, the FPPC has interpreted statutes requiring appointments to be made to members having "training and experience" in a certain industry as insufficient to show intent by the legislature to allow for the exception in California Code of Regulations title 2, section 18707.4 of the California Code of Regulations. *Donovan* Advice Letter, I-04-193.

While the CACC bylaws do not specifically require the SDSU appointees to be a "representative of" SDSU, the Council Policy implies that the appointments to designated seats are for the

purpose of representing the specific interest, in that the purpose of the appointments is “to better represent the specific interests of the community.” Council Policy 600-24, Article III, Sec. 3, at 6. Therefore, the SDSU members are likely appointed for the purpose of representing that portion of the College Area community.

CONCLUSION

The state and local conflict of interest laws do not apply to the CPGs. In addition, the appointment or election of SDSU employees to the CACC does not create a de facto direct economic interest, as prohibited by the Council Policy. Should the CACC wish to clarify that the SDSU appointments are made for the purpose of representing SDSU’s interest, it may do so.

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